(2)

No. 90-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL MA,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

A. Overview

The Petition argues that this lawsuit raises fundamental Constitutional issues and that the opinion below will have a devastating national impact. It is difficult to imagine more serious "misstatements" concerning this action. Indeed, this Petition is a prime example of why this Court

changed its rule to encourage responses to certiorari petitions to correct "misstatements of fact or law" before the Court rules on such petitions. *See* Sup. Ct. R. 15.1.

Contrary to what the Petition says, this action involves only a state law breach of contract claim between a bank and a depositor over the handling of funds in a money market account. *No* Constitutional issue is presented. Indeed, any such "due process" issue was long-ago waived by the Petitioner. A Constitutional due process claim was once raised in this case, as Count IV of the Complaint. (App. 5-6.) But that claim was so deficient that, after the Respondent filed its motion to dismiss that count (because of the absence of "state action"), Petitioner voluntarily dismissed the "due process" count. (App. 7.) The due process count was never re-asserted in the district court and, further, no Constitutional issue was raised on appeal before the Seventh Circuit.

Moreover, *no* federal issue—much less an important federal issue—is presented by the pleadings. Accordingly, in ruling on the breach of contract claim, the courts below merely applied state law principles of causation and damages.

In short, the Petition sets forth precisely what is *not* involved here, *i.e.*, any issue of Constitutional or federal law meriting this Court's attention. What *is* involved—an isolated state law contract claim lacking any merit or equity—is explained more fully below.

B. Underlying Facts

As of December 6, 1984, the Petitioner, Michael Ma ("Ma"), then a resident of Hong Kong, had certain funds in an account in Hong Kong at Continental Illinois Bank Limited (the "Bank's Subsidiary"). The Bank's Subsidiary

was then, and still is, wholly-owned by Respondent Continental Bank N.A., formerly known as Continental Illinois National Bank & Trust Company of Chicago (the "Bank").[1]

On December 6, 1984, a judgment for an amount that was subsequently determined to be in excess of $35 million (Hong Kong), or about $4.5 million (U.S.), was entered in Hong Kong against Ma and in favor of Fong Ming (the "Petitioning Creditor"). On that same day, Ma transferred his funds from the Bank's Subsidiary in Hong Kong to the Bank in Chicago to open the account at issue herein (the "Account"). At that time, Ma represented to the Bank that he was a Hong Kong resident, and all papers regarding the opening of the Account were prepared and executed in Hong Kong.

As found by a Hong Kong court, on December 8, 1984, only two days after the judgment was rendered against him and after transferring his funds from Hong Kong to Chicago, Ma "fled Hong Kong with some 30 cardboard boxes of his worldly possessions," leaving the judgment unsatisfied. *Ex parte Fong Sze Ming*, 1987 No. 77, at 2 (H.K. Ct. App. Dec. 21, 1987). Ma's daughter continued to live at his Hong Kong residence.

On March 14, 1985, the Petitioning Creditor filed an involuntary bankruptcy proceeding against Ma in Hong Kong (the "Bankruptcy"). Process was mailed to Ma's Hong Kong residence. Ma's daughter thereafter advised Ma of the Bankruptcy, and by May 1985, Ma had retained

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[1] The Bank's Subsidiary is actually a wholly-owned subsidiary of a wholly-owned subsidiary of the Bank.

Pursuant to Supreme Court Rule 29.1, the parent company of the Bank is Continental Bank Corporation. The Bank has no direct subsidiaries which are not wholly-owned by the Bank.

Hong Kong counsel to represent him in "all proceedings and matters in relation to" his Bankruptcy. *Id.* at 5. Thus, Ma had notice of the Bankruptcy soon after it was filed and well before the transfer of funds at issue took place.[2]

On April 1, 1985, the Hong Kong Official Receiver was appointed Receiver of the Bankruptcy estate and, on May 15, 1985, Ma was adjudicated a bankrupt. The Official Receiver was, thus, Ma's bankruptcy trustee and served as such at all times relevant hereto.

On or about June 12, 1985, the Bank was notified by the Bank's Subsidiary that Ma's Bankruptcy had been filed, and that the Official Receiver had requested copies of the statements of the Account. Thereafter, the Official Receiver communicated to the Bank's Subsidiary his intent to collect the funds remaining in the Account. On or about June 27, 1985, the Bank's Subsidiary, based on advice of counsel, had the Bank transfer the balance in the Account to the Official Receiver. In order to effect such transfer at no charge to Ma, the Bank transferred the funds to the Bank's Subsidiary for transmission to the Official Receiver. The Bank used its Subsidiary merely as a conduit to effect the transfer to the Official Receiver. The transfer was completed, and the Official Receiver received the funds, on or about July 9, 1985.

Ma learned or should have learned of the transfer no later than November 12, 1985. On that day, the Zurich, Switzerland branch of Chemical Bank requested on be-

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[2] Ma's claim in his Petition (at 3) that he "never received notice of the involuntary bankruptcy proceeding" is directly contradicted by the May 24, 1989 Affidavit he filed as an exhibit to his Reply Memorandum In Support of His Cross-Motion for Summary Judgment. In that Affidavit, Ma admitted that his daughter advised him of the Bankruptcy in late May 1985 and that he promptly retained lawyers to represent him in the Bankruptcy.

half of Ma that the balance of the Account be transferred to an account at Chemical Bank's New York office. As Ma's Account had been closed in July, no funds were transferred.

Notwithstanding that Ma retained bankruptcy counsel as early as May 1985, and that Ma learned or should have learned of the Bank's now-challenged transfer of funds by November 1985, Ma did not present his motion to set aside the Bankruptcy until almost two years later—on March 31, 1987. On December 11, 1987—over two years after the Bank transferred the funds to the Official Receiver—a Hong Kong court dismissed the Bankruptcy based on its finding that Ma had not been technically "served" with notice of the Bankruptcy. The Petitioning Creditor appealed from that order.

During the pendency of the Petitioning Creditor's appeal, Ma and the Petitioning Creditor entered into a settlement of the Bankruptcy and the $35 million (H.K.) December 6, 1984 judgment which precipitated it. Pursuant thereto:

- The right to the funds collected by the Official Receiver in connection with the Bankruptcy (including the funds from the Account) net of the Official Receiver's fees and expenses was transferred by Ma to the Petitioning Creditor;
- Ma provided other consideration to the Petitioning Creditor, including payment of $9.1 million (Hong Kong); and
- The Petitioning Creditor dismissed his appeal from the December 11, 1987 order dismissing the Bankruptcy.

Thereafter, Ma brought this action.

C. Rulings Of The District Court

Ma filed this action in September 1988. In his Complaint, Ma purported to assert claims for breach of con-

tract (Count I), conversion (Count II), negligence (Count III) and violation of his Constitutional due process rights (Count IV), based on the Bank's transfer of the funds in the Account to the Official Receiver. (App. 1-6.)

The Bank moved to dismiss Counts II through IV and filed an answer and affirmative defenses with respect to Count I. In response, Ma moved to voluntarily dismiss his due process and conversion counts, and he defended the negligence count. On December 16, 1988, the district court granted Ma's voluntary dismissal motion and dismissed the "due process" and conversion claims. (App. 7.) On January 9, 1989, the district court also granted the Bank's motion to dismiss the negligence count, leaving only the breach of contract claim in Count I.

On February 27, 1989, the Bank moved to dismiss or for summary judgment on Ma's breach of contract claim. Thereafter, Ma cross-moved for summary judgment. On August 3, 1989, the district court granted the Bank's motion, denied Ma's cross-motion and entered judgment in favor of the Bank on Count I. (Petition, App. 9a-12a.) The district court held that, even assuming *arguendo* that the Bank breached its contract with Ma (which issue was not decided), Ma suffered no damages as a result thereof. (*Id.* at 11a-12a.) The court accordingly did not reach the issue of whether the Bank was entitled to transfer the funds to Ma's Official Receiver. Subsequently, on August 16, 1989, Ma's motion for reconsideration was also denied. (*Id.* at 13a.)

Ma appealed from the August 3 and 16, 1989 orders.[3]

[3] No appeal was taken from the December 16, 1988 order allowing the voluntary dismissal of the due process and conversion claims. Also, no appeal was taken from the January 9, 1989 order dismissing the negligence count. Thus, the appeal which was filed concerned only the state law breach of contract claim.

D. The Court Of Appeals' Decision

On June 21, 1990, the Court of Appeals for the Seventh Circuit affirmed the district's court's ruling with respect to Ma's breach of contract claim. 905 F.2d 1073. Like the district court, the Court of Appeals did not reach the issue of whether the Bank had breached the deposit contract. Rather, it based its ruling on state law causation principles and held that the Bank's transfer did not cause Ma's loss.[4]

REASONS FOR DENYING THE PETITION

I.

THIS ACTION PRESENTS NO CONSTITUTIONAL DUE PROCESS OR OTHER IMPORTANT "FEDERAL" ISSUE

A. Ma Waived His "Due Process" Claim, Which, In Any Event, Is Meritless

The gravamen of Ma's Petition before this Court is that his "due process" rights were violated. First, he argues that his due process right to adequate notice was violated in the Hong Kong Bankruptcy and that he should have been given an opportunity in the United States to challenge his Hong Kong Bankruptcy. (Petition 7-10.) Then, he argues that the July 1985 transfer of the funds by the

[4] As a result of the holdings of the Court of Appeals and the district court, there is no ruling to review regarding the "propriety" of the Bank's transfer of the funds. At most, this Court could review only the state law causation issue and, if it found that issue to be wrongly decided, remand for the courts below to address the legality of the transfer itself.

Bank "patently offends traditional concepts of due process" because he was not given an opportunity to contest such transfer in the United States by again contesting the legality of the Bankruptcy. (*Id.* at 11.) Both arguments are, at bottom, virtually identical due process theories. Neither is properly before this Court.

The due process theory set forth in the Petition is precisely the one which Ma waived in the district court nearly two years ago! In Count IV of his Complaint, Ma asserted that his "due process rights have been denied" as a result of the Bank's action. (Complaint, Count IV, ¶12; App. 5-6.) The Count was titled "Due Process." (App. 5.) But, after the Bank moved to dismiss that "due process" claim on the ground that no state action was involved, Ma promptly moved to voluntarily dismiss the count. On December 16 , 1988, the district court granted Ma's request, holding that Ma could not thereafter raise the due process claim "without leave of court upon properly noticed motion." (Order of district court, dated December 16, 1988; App. 7.)

Ma never sought leave of the district court to re-raise his "due process" claim. Nor did Ma attempt to raise this "Constitutional" claim in the Court of Appeals. Since December 16, 1988, the "due process" claim simply has not been part of this case. It is beyond dispute that, where a theory is not raised (or is abandoned) in the district court, it is waived and cannot be raised for the first time on appeal. *See, e.g., Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1476 (1990). For this reason alone, the Petition should be denied.

But there is more. Again, the basis of the Bank's initial motion to dismiss the due process count was that the

Complaint contained no allegations that either the federal government or a state government was an actor in the alleged violation. Accordingly, Ma's due process claim was fatally flawed. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982) ("state action" required for 14th amendment claim); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-44 (1987) (same for 5th amendment claim). Indeed, Ma admits in the present Petition that there was no state action here. (Petition 11.) Because there is no such state action, Ma's Constitutional due process arguments are baseless.[5]

B. No Important Federal Issue Is Presented By This Case

Further, the only federal issue Ma purports to raise is extremely limited in scope and lacks any national import. Neither court below reached the issue of whether Section 304 of the Bankruptcy Code imposed on the Bank a duty to require the Official Receiver to file an ancillary proceeding thereunder. At most, Section 304 arose in the Court of Appeals as a tangential matter. That court, responding to Ma's arguments, spoke to Section 304 only in the context of showing that the Bank's transfer was not a cause of Ma's "loss" because the same result would

[5] Indeed, Ma's assertion of an obviously flawed due process issue, coupled with the omission from his Petition of the fact that he previously voluntarily dismissed his due process claim, is so egregious and so pervasively undercuts the basis of his Petition, that the Bank respectfully submits that it is appropriate to grant attorneys' fees to the Bank to compensate it for the cost of the instant Response or, alternatively, to remand the case to the courts below for the purpose of awarding such fees and costs. *See* 28 U.S.C. §1927 (sanctions authorized against attorney who "so multiplies the proceedings in any case unreasonably and vexatiously"); *see also* Fed. R. Civ. P. 11.

have been reached had a Section 304 proceeding been filed. *Ma*, 905 F.2d at 1075-77.

Further, to the extent the Section 304 issue is present here at all, there is no question that this "federal" issue is not one which this Court should address. Ma has not pointed to any split of authority on the issue, much less to a suggestion by courts that the issue is a difficult or confusing one. And, given the paucity of any authority on the issue and the infrequency with which it arises (if at all), resolution of the merits of the issue could hardly have a wide impact on society. In sum, stripping the Petition of its rhetoric, this case presents no important or otherwise pressing federal issue.

* * *

When the Constitutional claim is dismissed as the red-herring it is, and the "federal" issue seen for what it is, all that is left is a state law breach of contract issue. Even with respect to this issue, there is no split of authority or overriding national interest implicated. The Bank believes, and respectfully suggests, that the state law contract issue offered does not merit this Court's attention. *See* Sup. Ct. R. 10.

II.

THE SOLE ISSUED RAISED—WHETHER THE BANK'S TRANSFER CAUSED MA'S "LOSS"—WAS PROPERLY DECIDED BY THE COURTS BELOW

As shown above, there is no Constitutional or federal issue for this Court to decide. Nor is there any nationally important or disputed state law issue. Moreover, the state law issues were correctly decided by the courts below. This is because the Bank's conduct in transferring the funds was not the *cause* of any harm which Ma may have suffered. Rather:

- Any damage was the result of Ma's long and deliberate inaction; and
- Had the Bank required the Official Receiver to file a Section 304 proceeding (which procedure Section 304 does not require), the bankruptcy court would have enforced the Hong Kong Bankruptcy proceedings and required the turnover of the funds to the Official Receiver.

A. Ma's "Loss" Resulted Not From The Bank's Conduct, But From Ma's Inaction

Because this is a diversity action involving an Illinois bank account, Illinois law governs Ma's breach of contract claim.[6] Illinois law is firmly established that a plaintiff may not recover for damages unless they were proximately caused by the alleged breach of contract. The Seventh Circuit, applying Illinois law, has confirmed that:

> [A] bank will not be held liable [for depositor's losses] "unless there is a clear causal relationship between the bank's actions and the plaintiff's loss."

Appliance Buyers Credit Corp. v. Prospect National Bank, 708 F.2d 290, 294 (7th Cir. 1983) (citation omitted); *accord Klucznik v. Nikitopoulos*, 152 Ill. App. 3d 323, 503 N.E.2d 1147, 1152 (2d Dist. 1987); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 613, 499 N.E.2d 535, 537 (1st Dist. 1986) ("Speculative damages or damages not the proximate result of the breach will not be allowed").

Here, any "loss" suffered by Ma was not proximately caused by the Bank's conduct. The only Bank conduct chal-

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[6] As the district court noted in its August 3, 1989 opinion, both "parties have treated Illinois law as the governing law in this case." (Petition, App. 11a n.2.)

lenged by Ma is this: the Bank transferred Ma's funds to Ma's Bankruptcy trustee—the Official Receiver. Yet, as of that point, Ma had suffered no loss at all. The money still constituted part of his assets. The only difference was that, because Ma was in bankruptcy, these (and all other of his) assets were then being held by the Official Receiver. To prove the point in its simplest terms—had the Bankruptcy been dismissed immediately after the Official Receiver received the funds from the Account and had Ma then obtained the money from the Official Receiver, there would have been no "damage" to Ma. Thus, any damage later occurring (if any) could not have been caused by the Bank.

Indeed, whatever caused Ma's alleged loss happened *after* the transfer, that is, after the Bank's involvement totally and completely ceased. This is what happened after the Bank's July 1985 transfer:

- With full knowledge that the funds from the Account were being held and were subject to being spent by the Official Receiver, Ma sat back and did nothing for almost two years;
- Ma made no challenge to the Bankruptcy until March 31, 1987, almost two years after retaining counsel;
- In the meantime, as Ma was well aware, the Official Receiver diligently pursued its task of collecting assets which made up Ma's Bankruptcy estate and incurred expenses in connection therewith;
- Ma then agreed to allow all remaining funds held by the Official Receiver to be paid to the Petitioning Creditor as part of the settlement which discharged Ma's judgment debt to that Creditor; and
- Ma filed no proceedings to recover the funds at issue until the district court action was filed in Sep-

> tember 1988, after the Bankruptcy had been settled and after he had ultimately given up any right to the funds at issue to his Petitioning Creditor.

Thus, for two separate reasons, any supposed "loss" was not caused by the Bank's transfer. First, if Ma is correct that the Bankruptcy was invalid because of the type of service made, then all he had to do to put a halt to the Bankruptcy (and obtain possession of the transferred funds) was to file a motion to dismiss. And Ma should have filed this motion promptly after learning of the Bankruptcy to avoid any expenses and costs of the Official Receiver being taxed against the Bankruptcy estate. However, *Ma* chose not to challenge the Bankruptcy promptly; instead he waited nearly two years to do so. As a result of Ma's non-action, he lost his opportunity to stop the Bankruptcy before or soon after the funds from the Account were transferred and before the Official Receiver had spent substantial sums collecting Ma's assets.

Moreover, Ma's ultimate parting with these funds was caused not by anything the Bank did, but by Ma's own voluntary act in settling with the Petitioning Creditor. By voluntarily transferring the right to the Account funds, Ma gave up any hope of recovering them for himself from the Official Receiver. Thus, it was not the Bank's transfer of the funds to the Official Receiver that caused Ma to lose the money; it was Ma's use of these funds to discharge his debt to the Petitioning Creditor that resulted in such "loss."

Plainly, Ma's voluntary delay and his voluntary settlement were, in effect, intervening or superceding causes of the alleged "loss." For these reasons, the Bank's transfer of the funds did not "cause" Ma's alleged loss.

B. The Result Is No Different Under Section 304 Of The Bankruptcy Code

Even were the Court to ignore the impact of Ma's deliberate and lengthy inaction, application of Section 304 of the Bankruptcy Code to the facts of this case does not alter the result. That is because Section 304 presents an optional, not mandatory procedure, and because, even had a Section 304 proceeding been filed, the funds would nonetheless have been obtained by the Official Receiver.

1. Federal Law Does Not Require Banks To Hold Deposits Until A Foreign Representative Initiates A Section 304 Proceeding

Ma's contention (at p.7 of his Petition) that the Bank "was clearly obligated to require the Hong Kong Official Receiver to initiate an 'ancillary proceeding' [under Section 304] with a bankruptcy court in Illinois before it transferred Ma's funds" to the Official Receiver is unsupported by any federal law. The language of Section 304 addresses an *option*, and then one which is available only to a "foreign representative," not to entities or financial institutions holding assets of the bankrupt debtor. *See* 11 U.S.C. §304; Petition at 2-3. The Bank knows of no statute or opinion—and Ma has cited to none—which requires *banks* or other financial institutions to refuse to transfer assets to foreign representatives absent the filing of a Section 304 proceeding.[7]

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[7] The courts below did not reach this issue. Moreover, *RBS Fabrics Ltd. v. G. Beckers & Le Hanne*, 24 Bankr. 198 (S.D.N.Y. 1982), cited by Ma, did not address this issue. The issue there was whether a claim of a United States creditor of a foreign debtor should be resolved in the United States or in Germany where bankruptcy proceedings against the debtor were pending. The court held merely that it was preferable that such choice of forum issue be resolved by a bankruptcy court in a Section 304 proceeding than by the district court in an attachment action.

Further, Section 304 does not even impose a requirement on the foreign representative to file a proceeding thereunder. The statute contains no language making such filing "compulsory," and both the pertinent House and Senate Reports state only that a foreign representative in a foreign bankruptcy case "*may* file a petition under this section." H. Rep. No. 595, 95th Cong., 2d Sess. 324-25, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6281; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5787, 5821. Thus, Section 304 does not mandate that its procedure is the only one available to the foreign representative. *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1472 (4th Cir. 1987); *Cunard Steamship Co. v. Salen Reefer Services AB*, 773 F.2d 452, 455-56 (2d Cir. 1985). *A fortiori*, the Bank could not be bound to have required the Hong Kong Official Receiver to have filed a Section 304 proceeding.

2. Even If A Section 304 Proceeding Had Been Filed, The Funds In The Account Would Have Been Transferred To The Official Receiver

As shown above, Ma's failure to act in a timely fashion—not the Bank's transfer of the funds—caused his "damage." But Ma says that he should have been given the opportunity in the United States (as well as in Hong Kong) to contest the Bankruptcy by having the Bank require the Official Receiver to file a Section 304 proceeding to obtain the funds. While, as already discussed, the Bank disagrees with this assertion, even under Ma's preferred procedure the result would have been no different.

In a Section 304 proceeding, a debtor's right to collaterally attack the foreign bankruptcy proceedings is very limited. Generally, such proceedings are enforced unless

the enforcement would prejudice the rights of United States citizens or violate domestic public policy, or the foreign tribunal lacked jurisdiction. *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987). Ma does not argue (and has never argued) that the Hong Kong procedures—adopted directly from the British model on which our bankruptcy laws were based—did not provide sufficient procedural safeguards or otherwise violated domestic public policy.[8] Ma himself took advantage of these safeguards, albeit belatedly, in challenging the Bankruptcy two years after it was filed. And, there can be no claim that enforcement of the proceedings prejudiced rights of United States citizens as Ma apparently had no United States creditors. Ma is thus left with his jurisdictional argument.

Ma's jurisdictional attack on the Hong Kong proceedings is apparently based solely on his claim that he was not properly served with notice of the Bankruptcy.[9] Yet, for

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[8] Indeed, United States courts have frequently given effect to the bankruptcy laws of Hong Kong and other British colonies. *In re Axona Intl Credit & Commerce Ltd.*, 88 Bankr. 597, 610-11 (Bankr. S.D.N.Y. 1988) ("Hong Kong [bankruptcy] law is not repugnant to our ideas of justice, and is inherently fair and regular"); *In re Lines*, 81 Bankr. 267, 269-70, 273 (Bankr. S.D.N.Y. 1988) (Bermuda proceeding); *In re Gee*, 53 Bankr. 891, 901-04 (Bankr. S.D.N.Y. 1985) (Cayman Island proceeding); *In re Culmer*, 25 Bankr. 621, 629-32 (Bankr. S.D.N.Y. 1982) (Bahamian proceeding).

[9] It must be remembered that Ma's claim that he was not properly "served" with notice of the Bankruptcy in 1985 was based on a technicality. Ma in fact received actual notice of the Bankruptcy, as shown by his May 1985 retention of counsel with respect to the Bankruptcy. Further, notice of the Bankruptcy was sent to Ma's Hong Kong residence where his daughter continued to reside and where at least one letter was sent by the Bank to Ma and admittedly received by him. Such address was the only one known to the authorities because, during such period, Ma was "in flight"

(Footnote continued on following page)

the notice to have been sufficient to enforce the Bankruptcy under principles of comity, it need only have been the "bare minimum" notice required by the Constitution.[10] *Ma*, 905 F.2d at 1076, *citing Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). The facts with respect to the "notice" issue are undisputed:

- Notice of the filing of the Bankruptcy was sent to Ma's residence in Hong Kong, the residence from which Ma had clandestinely fled only months before;
- Ma's daughter, who had continued to live in his Hong Kong residence after Ma's departure, received notice of the Bankruptcy, and thereafter contacted Ma and advised him of the Bankruptcy; and
- By the end of May 1985, Ma had retained solicitors to represent him in the Bankruptcy.[11]

Where, as here, the process employed was reasonably calculated to produce notice, the minimum Constitutional notice requirements necessary to the enforcement of a foreign judgment have been satisfied. *See, e.g., Virginia Lime Co. v. Craigsville Distributing Co.*, 670 F.2d 1366

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[9] *continued*

in an attempt to evade the judgment against him. Moreover, contrary to Ma's suggestion (Petition at 5 & 9), the Hong Kong courts did not even finally resolve the technical "service" issue. Rather, an appeal of the Hong Kong court's December 11, 1987, ruling on the issue was pending when Ma entered into the settlement which resulted in the dismissal of such appeal and the Bankruptcy.

[10] There is, and can be, no question that Ma, a long-time resident of Hong Kong, had sufficient "minimum contacts" with Hong Kong to justify its assertion of jurisdiction over him assuming sufficient service.

[11] It should be noted that the transfer of the funds at issue did not occur until *July* 1985, more than one month after Ma had retained counsel to represent him in the Bankruptcy.

(4th Cir. 1982) (mail to last known address is constitutionally sufficient); *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979) (same). Such notice requirements are plainly met where, as here, notice was in fact sent to Ma's last known address, *i.e.*, the only place he could have been reached given his flight.

Accordingly, any attack by Ma in a Section 304 proceeding on the enforceability of the Hong Kong Bankruptcy proceedings would have failed. Instead, the bankruptcy court would have enforced the Hong Kong Bankruptcy, and the Bank would have been ordered to transfer the funds in the Account to the Official Receiver, whom even Ma concedes was otherwise his properly-appointed bankruptcy trustee. As the Court of Appeals concluded:

> So far as Ma is concerned, the only difference between the informal procedure the Bank used and a formal proceeding under §304 was the lack of an opportunity to wage a collateral attack on the Receiver's appointment. As such an opportunity would have been worthless to Ma and would only have raised the cost of administering the estate, *the procedures the Bank followed did not cause Ma any loss.*

905 F.2d at 1077 (emphasis added).

* * *

In sum, there was no "clear causal relationship" between the transfer by the Bank and Ma's alleged "loss." *Appliance Buyers Credit Corp.*, 708 F.2d at 294. The acts (and omissions) which caused the loss, if any, were those of Ma. Having incurred a huge obligation, attempted to run away therefrom, and, finally, having settled *his* underlying debt at his own pace, Ma tried to grasp on to a technicality and have the Bank reimburse him for part of his debt. Such a result would be an unconscionable windfall for Ma. Ma's desperate and continuing attempt to obtain such a windfall should now be put to rest.

CONCLUSION

For the foregoing reasons, this Court should deny Ma's Petition.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL MA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking corporation,	)	JURY DEMANDED
	)	
Defendant.	)	

COMPLAINT

Plaintiff, MICHAEL MA, by his attorneys, Eugene J. Kelley, Jr. and Hal R. Morris (Arnstein, Gluck, Lehr & Milligan, Of Counsel), complains of defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, a national banking corporation, as follows:

COUNT I

1. Plaintiff, Michael Ma, is an individual who is a resident of the country of Switzerland.

2. Defendant is a banking corporation duly organized national bank, and has its principal place of business in Chicago, Illinois. At all times relevant, defendant was authorized to conduct and was conducting business in the State of Illinois.

3. The amount in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000).

4. Jurisdiction is based upon diversity of citizenship in the requisite jurisdictional amount.

5. On or about December 6, 1984, plaintiff established and opened a money market account, Account No. 00-9483003, with defendant.

6. Upon the establishment and opening of the money market account, defendant became bound by an implied contract under which it was to hold all deposits or other funds in the subject account to be disbursed only in conformity with plaintiff's instructions.

7. Subsequent to the opening of the subject account, plaintiff made numerous deposits and withdrawals.

8. As of July 1, 1985, the balance in said account was $157,432.37.

9. On July 1, 1985, defendant withdrew or caused to be withdrawn all of the funds on deposit in the subject account. Said withdrawal was made without the instruction, check, order, direction or assent of plaintiff.

10. Subsequent to July 1, 1985, plaintiff made numerous requests for reimbursement of the funds which were withdrawn on that date. Further, plaintiff has fully performed all terms and conditions of its agreement with defendant.

11. Defendant refuses and continues to refuse to reimburse plaintiff for the funds withdrawn on July 1, 1985.

12. Defendant has not performed its agreement with plaintiff in that it disbursed funds on deposit in the subject account without the instruction, check, order, direction or assent of plaintiff.

13. Plaintiff has not ratified the July 1, 1985 withdrawal.

14. By reason of defendant's breach, plaintiff has sustained damages in the sum of $157,432.37 plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT II
CONVERSION

1-7. Plaintiff realleges and incorporates by reference paragraphs 1 through 7, inclusive, of Count I of this Complaint as paragraphs 1 through 7, inclusive of this Count II.

8. On July 1, 1985, plaintiff had on deposit with defendant the sum of $157,432.37, in the subject account for safekeeping to be disbursed only in conformity with plaintiff's instructions.

9. On July 1, 1985, defendant then and there converted for its own use and withdrew or caused to be withdrawn all of the funds on deposit in the subject account, thereby depriving plaintiff of the use and enjoyment of said funds.

10. Subsequent to July 1, 1985, plaintiff made numerous demands that defendant re-deliver and return the funds withdrawn on July 1, 1985 from the subject account.

11. Defendant has refused and continues to refuse to re-deliver the funds or to pay the value of the funds or any part to plaintiff.

12. Plaintiff has not ratified the July 1, 1985 withdrawal.

13. By reason of defendant's wrongful conversion of plaintiff's monies, plaintiff sustained damages in the sum of $157,432.37, plus interest, no part of which has been paid.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $1,000,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT III
NEGLIGENCE

1-7. Plaintiff realleges and incorporates by reference paragraphs 1 through 7, inclusive, of Count I of this Complaint as paragraphs 1 through 7, inclusive of this Count III.

8. At all times relevant, defendant had a duty to protect the funds of plaintiff held on deposit at defendant's bank and to only pay out such funds in conformity with plaintiff's instructions.

9. On July 1, 1985, defendant wilfully, or recklessly or negligently paid out the funds held on deposit in the subject account. Said funds were paid without the instruction, check, order, direction or assent of plaintiff, or the appropriate order of a court with jurisdiction.

10. Illinois law provides a statutory method whereby foreign judgments may be registered in the United States to be accorded full faith and credit and enforced. Ill. Rev. Stat. ch. 110, ¶¶12-601-12-617, ¶¶12-618-12-626.

11. Defendant claims to have paid the funds from said money market account in satisfaction of a foreign judgment entered by the official receiver of Hong Kong.

12. Notwithstanding defendant's claim, no registration of the Hong Kong receiver's judgment was ever entered and proper notice was never served on plaintiff.

13. As a result of defendant's breach of its duties, plaintiff has been damaged in the sum of $157,432.37, plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $1,000,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

COUNT IV
DUE PROCESS

1-2. Plaintiff realleges and incorporates by reference paragraphs 1 through 2, inclusive, of Count III of this Complaint as paragraphs 1 through 2, inclusive, of this Count IV.

3. Jurisdiction is based on this Court's Federal Question Jurisdiction 28 U.S.C. §1331.

4-11. Plaintiff realleges and incorporates by reference paragraphs 5 through 12, inclusive, of Count III of this Complaint as paragraphs 4 through 11 of this Count IV.

12. As a result of defendant's breach and failure to require registration of the purported judgment against plaintiff, prior to withdrawing or causing to be withdrawn all

the funds in the subject account, plaintiff's due process rights have been denied and plaintiff has been damaged in the sum of $157,432.37, plus interest.

WHEREFORE, plaintiff, MICHAEL MA, demands judgment against defendant, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, for the sum of $157,432.37 together with interest at the legal rate to the date of judgment; punitive damages in excess of $100,000; the costs of this action and such other and further relief as this Court shall deem just and equitable.

Plaintiff demands trial by jury

By: /s/ Hal R. Morris
One of the Attorneys for
Plaintiff, Michael Ma

Eugene J. Kelley, Jr.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 7827 Date: DEC. 16 1988

Name of Assigned Judge: WILLIAM T. HART

Case Title: Michael Ma v. Continental Illinois National Bank & Trust Company of Chicago

* * * * *

MOTION: Plaintiff's Motion to Voluntarily Dismiss Counts II and IV.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiff's motion to voluntarily dismiss counts II and IV without prejudice is granted on condition that plaintiff may not reinstate said counts without leave of court upon properly noticed motion.

* * * * *